

## RACING APPEALS TRIBUNAL

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RAT 11/09

**DATE:** FRIDAY, 16 OCTOBER 2009

**TRIBUNAL:** **DEPUTY PRESIDENT:** MR P ERIKSEN

**ASSESSOR:** MR J HODGINS

**MR G LOCH**, CHAIRMAN OF STEWARDS,  
THOROUGHBRED RACING SA LTD

**MR S WARD**, REPRESENTING THOROUGHBRED  
RACING SA LTD STEWARDS

**APPELLANT:** MR M WHITTLE

**MR M BELL**, REPRESENTING THE APPELLANT

**IN THE MATTER** of an Appeal by **MICK WHITTLE** against a decision of  
Thoroughbred Racing SA Ltd Stewards.

**BREACH OF RULE:** ARR 178

Rule 178: *When any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.*

**PENALTY:** SUSPENSION OF LICENCE FOR 4 MONTHS AND A FINE OF  
\$7,000

### **DETERMINATION**

The Appellant in this matter is a licensed trainer and presented the horse ALSO at a racing meeting conducted at Oakbank on 14 March 2009.

The horse ALSO was adjudged the winner of Race 4, the McGuinness McDermott Foundation Handicap – 2150 metres.

A sample of urine of ALSO taken post race, was analysed by Racing Analytical Services Ltd, situated at 400 Epsom Road, Flemington, Victoria 3031.

That entity issued a certificate, being Certificate Number RAS09/0727-D in respect of the sample, which certificate certified that the sample contained Hydrocortisone at a concentration of 1.3mg/L.

The Appellant was charged with having contravened Rule 178 of the Australian Racing Rules.

A combination of AR 178 part B and AR 178 part C subsection (2)(f) mandates that no horse shall be presented at a race meeting with a hydrocortisone concentration in excess of 1.00 mg/L in urine.

The Appellant attended a Stewards Inquiry, which commenced on 22nd May 2009 and was concluded on 14th July 2009.

The transcript of this hearing contains some 100 pages of evidence.

The Appellant was found guilty of the charge and was fined the sum of \$7,000 and has had his training licence suspended for a period of 4 months.

The Appellant appeals against penalty and the hearing proceeded over 2 days, namely Tuesday 6th October 2009 and Friday 16th October 2009.

At the Appeal the Appellant was represented by Mr Michael Bell of Counsel and the Respondent was represented by Mr Simon Ward of Counsel.

The Appellant filed Amended Grounds of Appeal on 30th September 2009, particularising nine Grounds of Appeal, all of which were argued at the hearing.

## THE NATURE OF THE APPEAL

This Tribunal is created and derives its jurisdiction from the provisions of the Deed between Thoroughbred Racing S.A. Limited, Harness Racing SA Limited, Greyhound Racing SA Limited and Racing SA Limited.

The nature of the Appeal is determined by section 13.9, which states:

*"13.9 Except as otherwise determined by the Tribunal, an appeal is to be conducted by way of re-hearing of the evidence at the original hearing, but the Tribunal may receive fresh evidence given orally, or if the Tribunal so determines, by statutory declaration."*

In considering the nature of the Appeal, I have had regard to the decisions of *Builders Licensing Board v Spierway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 and *Wigg v Architects Board* (1984) 36 SASR 111.

Having considered the contents of the Deed and the relevant case law, I am of the opinion that a liberal interpretation should be given to the manner in which evidence is received by the Tribunal during the hearing of the Appeal.

I allowed material to be tendered during the Appeal before the Tribunal, which included newspaper articles, testimonials, scientific papers and journals and laboratory samples taken from various horses engaged in racing in the State of South Australia and the State of Victoria.

## THE APPEAL

The Appellant in this matter sought to establish that the horse ALSO was a "special horse" and naturally produced the substance hydrocortisone above the prescribed level of 1.00mg/L.

The Appellant referred to previous positive and negative samples taken from the horse ALSO to develop the aforementioned proposition.

In addition, the Appellant relied heavily on the circumstances surrounding the taking of a sample from Victorian horses HEARSAY and DOWN UNDER BOY in April of 2008.

These swabs taken from the Victorian horses pre-race were found to have elevated levels of hydrocortisone, that is levels above 1.00 mg/L.

Racing Victoria's Stewards elected not to proceed with the prosecution of persons charged under the Victorian Racing Code for alleged breaches in respect of the elevated levels of hydrocortisone.

This Tribunal was never given any detailed explanation as to why the Victorian Stewards elected not to proceed with the abovementioned prosecution.

In order to understand the complexities of the matters raised in this Appeal, it is necessary to have regard to the expert evidence of the complete transcript of the proceedings before the Stewards, together with the evidence adduced before this Tribunal.

## HYDROCORTISONE

Dr Horridge is a well regarded Veterinary Surgeon who sat on the Stewards Inquiry, and Dr Vine, who holds the following qualifications:

Bachelor of Science with Honours

Master of Science

Doctor of Philosophy in Chemistry

Fellow of the Royal Australian Chemical Institute

Fellow of the Association of Official Racing Chemists

Laboratory Director of Racing Analytical Services Limited.

Dr Horridge agreed with the scientific evidence provided by Dr Vine, which is particularised hereunder.

Dr Vine gave the following evidence to the Stewards Inquiry:

DR VINE: And accompanying that letter was the analytical report to which I've been, I was referring previously. I think that takes us through the analytical process Mr. Chairman,

CHAIRMAN: Thanks Dr. Vine. Mr. Whittle, who is the trainer involved, has asked a question earlier.

DR VINE: Yes.

CHAIRMAN: Which we told him we'd leave for you to cover for us. Mr. Whittle has asked the question as to why and what are the issues with Racing Analytical finding 1.3 level of measurement in the sample and the Racing Science Centre finding a level of 1.4 milligrams per litre?

DR VINE: Well those two values would be considered good agreement between two different laboratories analysing specimens. The uncertainty of measurement is point one so in fact these two values overlap very significantly and wouldn't be considered that on any statistical basis the results are actually different.

CHAIRMAN: Mr Whittle, do you understand that response?

M WHITTLE: Yes.

CHAIRMAN: Is there any further questions of Dr. Vine in that matter?

M WHITTLE: No.

CHAIRMAN: Dr. Vine, is hydrocortisone, does it naturally occur in the animal?

DR VINE: Yes it does, it's a corticosteroid which circulates in the bloodstream and as a result is also excreted in urine to a varying extent. Hydrocortisone is a corticosteroid hormone which varies in levels during the day. It tends to be higher in the day than during the night and it starts to rise in the morning before you become awake and as you wake from sleep it rises quite significantly and there's a similar pattern in the horse. I know horse's sleeping patterns are not identical to human sleeping patterns but there is the same variation, it's what's usually referred to as a diurnal variation, that is, it's tied in, the level of hydrocortisone is tied into the time of day.

CHAIRMAN: And has any work been done on that natural level of hydrocortisone in an animal in respect of the international level that's been adopted in Australia, that's in Australian Rule 178C, part (f)?

DR VINE: Yes, the threshold that exists in the Rules has been set on the basis of population studies where hydrocortisone levels have been measured in large numbers of horses at different times and under different circumstances and from that data you're able to statistically derive if you like an average level and the standard deviation and then by applying a number of standard deviations to the average level you can ascertain a threshold value which is a value where you can state with a high degree of certainty that unless hydrocortisone is actually administered exogenously to the horse, there's no prospect that that level could be obtained through processes of natural variation.

CHAIRMAN: And is it possible to identify in an animal the endogenous and exogenous succinates?

DR VINE: Well in some specialised cases you can determine different forms of hydrocortisone and the most recent instance there is that the only injectible form of hydrocortisone, which is available in Australia at the moment, is a human product, which actually contains a derivative of hydrocortisone called hydrocortisone sodium succinate and it is possible to detect the free form of hydrocortisone sodium succinate which is actually called hydrocortisone hemisuccinate. It's possible to detect that free form directly in urine and if you can do that you can say that the, that material is of exogenous origin because it doesn't occur naturally. In terms of hydrocortisone itself, you can only infer the use of exogenous hydrocortisone by the fact that a value over that threshold of a milligram per litre has been obtained so when the value goes over that threshold you are better able to say that some or most of the hydrocortisone that you're seeing has in fact come in through some exogenous source.

...

L WHITTLE: Apparently there is a big difference between natural hydrocortisone and synthetic according to my studies, it's a different chemical.

DR VINE: No there's no difference whatsoever. Hydrocortisone is hydrocortisone. It doesn't matter where it's come from, whether it's endogenously produced or exogenously produced. The chemical substance called hydrocortisone is the same. What your references may well be referring to is that you can get different formulations of hydrocortisone which might have extra little bits attached to the hydrocortisone molecule or have hydrocortisone in other different forms but hydrocortisone is hydrocortisone whether it's synthetic or naturally occurring.

## **VICTORIAN HORSES "HEARSAY" AND "DOWN UNDER BOY" AND HYDROCORTISONE LEVELS**

At the Steward's Inquiry and at the Appeal in this case, much of the argument centred around a proposition which was strongly advanced by Mr Bell, that "special horses" can by their own bodily function produce hydrocortisone levels in excess of 1.00 mg/L.

Mr Bell then argued that the horses ALSO, HEARSAY and DOWN UNDER BOY were "special horses".

Mr Bell then submitted that if a finding of this nature was made by this Tribunal, then it followed that the Appellant or any other human had not administered hydrocortisone to the horse ALSO prior to it racing at Oakbank.

Mr Bell further submitted that such findings would then constrain the Tribunal to record no penalty.

The horse HEARSAY was tested on numerous occasions in Victoria and on one occasion, when it was presented to race at Geelong in 2008, a urine sample subsequently returned a result of 1.3 mg/L of hydrocortisone.

This sample was taken pre-race and the expert evidence is that hydrocortisone levels are usually higher post-race.

On this occasion, HEARSAY had been under the supervision of officers of Racing Victoria for a period in excess of 6 hours.

As aforementioned, the Stewards in Victoria did not proceed with the charges brought against the trainer of HEARSAY.

During the Appeal, evidence was taken from the officer who carried out the surveillance of HEARSAY and the then Chairman of Stewards, Mr Gleeson.

Dr Vine, who was involved in supervising the test in respect of HEARSAY gave evidence before this Tribunal and was vigorously cross-examined by Mr Bell.

Dr Vine, in the evidence before the Tribunal, did not resile from his view, that in his opinion, that if a horse produces a sample with a level of hydrocortisone in excess of 1.00 mg/L, human intervention has been involved in achieving such a level.

## **ABSENCE OF EXPERT EVIDENCE CONTRADICTING DR VINE AND DR HORRIDGE**

No expert evidence was called by the Appellant at the Steward's Inquiry or before this Tribunal to contradict the opinions expressed by Dr Vine and Dr Horridge.

In short, the Tribunal was asked to make findings on the whole of the evidence to the effect that the horses ALSO and HEARSAY were “special horses” and naturally produce hydrocortisone levels above 1.00 mg/L.

### **CONCLUSIONS REGARDING ARGUMENT “ALSO” NATURALLY PRODUCED HYDROCORTISONE IN EXCESS OF 1.00mg/L**

I am not persuaded, on the whole of the evidence, including all of the analytical samples in respect of the horses ALSO, HEARSAY and DOWN UNDER BOY, that on the balance of probabilities, the horse ALSO naturally produced hydrocortisone in the amount of 1.3 mg/L, as recorded in Certificate Number RAS09/0727-D.

The evidence of the positive samples of hydrocortisone taken pre-race from the Victorian horses HEARSAY and DOWN UNDER BOY, in the absence of expert evidence to support the argument that these horses could naturally produce these levels of hydrocortisone, does no more than raise a possibility that this substance could be naturally produced and does not achieve the standard that on the balance of probabilities, this was the case.

### **FINDING**

This Tribunal finds, on the evidence of Dr Horridge and Dr Vine, that the horse ALSO will not naturally develop and/or create hydrocortisone levels above 1.00 mg/L and did not do so when presented to race at Oakbank as aforementioned.

### **PENALTY**

Mr Whittle has, in the past, suffered very serious health issues. He has had a “heart transplant”, approximately 18 months ago.

He has been a prominent trainer interstate and in South Australia for many years.

In all the circumstances, considering the health and age of Mr Whittle and noting that the horse ALSO has now been retired from racing and after conferring with my Assessor, the Tribunal upholds the Appeal against penalty and imposes the following penalty:

The fine will remain. The suspension of the trainer’s licence is increased to a suspension of 6 months but it will be suspended for a period of 12 months. That suspension is on the condition that the Appellant does not breach any of the Rules by way of a similar offence within that 12 month period. If he does, the 6 months suspension will become operative.

The commencement of the suspended suspension of 6 months will commence forthwith.

I order that \$400 of the \$500 bond be refunded.